No. 20-72794

IN THE

United States Court of Appeals for the Ninth Circuit

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents,

and

THE HARTZ MOUNTAIN CORPORATION,
Proposed Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MOTION OF THE HARTZ MOUNTAIN CORPORATION FOR LEAVE TO INTERVENE AS RESPONDENT

Kirsten L. Nathanson
Michael Boucher
Amanda Shafer Berman
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2887
knathanson@crowell.com

Counsel for Proposed Intervenor-Respondent The Hartz Mountain Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The Hartz Mountain Corporation respectfully submits the following Corporate Disclosure Statement:

The Hartz Mountain Corporation is a New Jersey corporation. The Hartz Mountain Corporation is jointly owned by Unicharm Corporation, Sumitomo Corporation, and Sumitomo Corporation of Americas. Unicharm Corporation and Sumitomo Corporation are publicly traded on the Tokyo Stock Exchange. Sumitomo Corporation of Americas is a wholly owned subsidiary of Sumitomo Corporation. Thus, shares of Sumitomo Corporation of Americas are not publicly traded. No other corporation holds a 10% or greater ownership interest in Hartz.

October 19, 2020

Respectfully submitted,

/s/ Amanda Shafer Berman
Kirsten L. Nathanson
Michael Boucher
Amanda Shafer Berman
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2887
knathanson@crowell.com

Counsel for Proposed Intervenor-Respondent The Hartz Mountain Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

MOTION TO INTERVENE

Pursuant to Rules 15(d) and 27 of the Federal Rules of Appellate Procedure, The Hartz Mountain Corporation ("Hartz"), respectfully moves this Court for leave to intervene in support of Respondents, the Environmental Protection Agency (EPA) and its Administrator, to protect Hartz's interests in the continued registration by EPA of Hartz's challenged products that contain the active ingredient tetrachlorvinphos (TCVP).

Hartz has spent years and millions of dollars developing pet-friendly products, including pet collars, which use TCVP to protect cats and dogs from fleas and ticks, parasites that EPA has identified as pests of significant public health importance. Hartz also participated extensively in the administrative proceedings below, in which EPA denied[1] Petitioner Natural Resource Defense Council's ("NRDC") petition to cancel the registration of all uses of TCVP on pets. Were NRDC to prevail in this proceeding, Hartz will face an EPA cancellation hearing for its TCVP product registrations and potential economic losses, as well as potential harm to its reputation among the many consumers who rely on Hartz for low-cost alternatives to protect their pets from parasites that transmit both discomfort and disease.

---

[1] U.S. Environmental Protection Agency, Docket No. EPA-HQ-OPP-2009-0308, Agency Response to the Natural Resources Defense Council's (NRDC) April 2009 Tetrachlorvinphos Petition (July 21, 2020) ("EPA Decision Document").

This Court has consistently allowed registrants to intervene in similar cases for the purpose of defending EPA's registration decisions, recognizing the significant stake that registrants have in EPA actions challenging the lawfulness of their registrations and in their corresponding ability to lawfully sell and distribute their products. *E.g.*, *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1081 n.3 (9th Cir. 2017); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 523 (9th Cir. 2015); *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 875-76 (9th Cir. 2013); *Ctr. for Food Safety v. EPA*, No. 14-73359 (9th Cir. Dec. 11, 2014), ECF No. 12. The Court should do so again here for the same reason.

Counsel for Hartz has conferred with counsel for all parties regarding this Motion. *See* Circuit Rule 27-1(2). Respondents do not oppose Hartz's intervention. Petitioners take no position at this time.

BACKGROUND

This case came to the Court under section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* NRDC seeks review of the July 21, 2020 EPA Decision Document rejecting NRDC's petition to cancel the registration of all uses of TCVP on pets, including the products registered by Hartz.[2]

---

[2] EPA Registration Nos. 2596-49, 2596-50, 2596-62, 2596-63, 2596-78, 2596-79, 2596-83, 2596-84, 2596-125, 2596-126, 2596-140, 2596-139.

FIFRA is a "a comprehensive regulatory statute" that "regulate[s] the use, . . . sale and labeling[] of pesticides[.]" *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 437 (2005) (quotation marks and punctuation omitted). Before a pesticide can be sold or distributed in the United States, it must be registered under FIFRA. *See* 7 U.S.C. § 136a(a). A registration is issued to a specific registrant, for a specific formula, packaging, and label. *See* 40 C.F.R. § 152.3; 7 U.S.C. § 136a(c)(1)(C).

TCVP was first registered as a pesticide in 1966 for the purpose of combatting ticks, fleas, certain flies, lice and insect larvae on livestock and domestic animals. *See* EPA Decision Document at 7. In the intervening 55 years, during which TCVP has been in continuous use, EPA has issued a reregistration eligibility decision for TCVP (in 1995), a residential exposure assessment (1999), an organophosphate (OP) cumulative risk assessment (2001), an interim Tolerance Reassessment Eligibility Decision (2002), and updates to the OP cumulative risk assessment (2002 and 2006). *Id.* This process culminated in EPA's TCVP Reregistration Eligibility Decision 2006. *Id.*

More recently, EPA initiated its periodic review of TCVP registrations, as required under FIFRA Section 3(g). *Id.* In 2009, shortly after EPA commenced the registration review process, NRDC submitted a petition to EPA seeking to cancel all uses of TCVP on pets, challenging EPA's 2006 Reregistration Eligibility Decision as arbitrary and capricious. *Id.* at 10. NRDC supplemented its petition for

cancellation with an issue paper that allegedly substantiated NRDC's concerns. *Id.* at 11. According to EPA, NRDC never provided EPA with "the necessary raw data to allow EPA to verify" the allegations in the issue paper. *Id.* EPA did, however, seek and receive comments from the public on NRDC's petition, including additional data from Hartz to support the continued registrations of its TCVP products. *Id.* at 10.

On July 21, 2020, after a decade of reviewing additional studies performed by Hartz and further proceedings, including consideration of a mandamus petition in this Court, EPA issued its Decision Document, denying NRDC's petition to cancel all uses of TCVP on pets. The EPA Decision Document confirmed the safety of certain Hartz products and explained that Hartz had elected to voluntarily cancel certain product registrations and to adopt additional restrictions on its use of certain other products to mitigate any health and safety concerns. *Id.* at 35-39.

NRDC filed a Petition for Review of the EPA Decision Document. If this Court were to grant NRDC's Petition for Review and remand NRDC's petition to cancel to EPA, Hartz would face potential cancellation proceedings and the prospect of significant economic and reputational damage depending on the outcome of those proceedings. In addition to incurring substantial lost sales as a result of any EPA cancellation of its TCVP uses, Hartz would lose the value of its continuous, decades-long investments in TCVP products, and Hartz's reputation as

a purveyor of safe and effective pet pesticide products would be seriously impaired. Requiring EPA to hold cancellation proceedings for all uses of TCVP on pets also could deprive animal lovers of an important tool for protecting their pets from fleas and ticks, which are parasites that EPA has identified as pests of significant public health importance.

ARGUMENT

I. HARTZ MEETS THE STANDARD FOR INTERVENTION AS OF RIGHT.

Federal Rule of Appellate Procedure 15(d) permits intervention in a petition for review proceeding where a proposed intervenor seeks to intervene "within 30 days after the petition for review is filed" and states an adequate "interest" and "grounds for intervention" in the appeal. Fed. R. App. P. 15(d). Although Federal Rule of Appellate Procedure 15(d) does not specify a standard for intervention, this Court looks to the principles underlying intervention in Rule 24 of the Federal Rules of Civil Procedure. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001); *see also Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (noting that "the policies underlying intervention [stated under Federal Rule of Civil Procedure 24] may be applicable in appellate courts"). The criteria for intervention as a matter of right under Fed. R. Civ. P. 24(a)(2) are as follows:

> (1) the motion must be timely; (2) the applicant must claim a

> significantly protectable interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (internal quotations omitted). This Court has instructed that Rule 24(a)(2) be interpreted "broadly in favor of proposed intervenors" to allow "parties with a *practical* interest in the outcome of a particular case to intervene." *United States v. City of L.A.*, 288 F.3d 391, 397-98 (9th Cir. 2002) (citations omitted).

Because Hartz satisfies all four requirements for intervention, the Court should grant Hartz's Motion, so that it may protect its significant interests at issue in this proceeding.

First, this Motion is timely. Under Federal Rule of Appellate Procedure 15(d), Hartz has thirty days from the date of the Petition for Review was filed to file a motion to intervene. The Petition for Review was filed on September 18, 2020. Because Hartz is filing within the time allotted under Rule 15(d), the Motion is timely. Furthermore, no prejudice or delay would result from Hartz's intervention because it is seeking to join at the earliest possible stage.

Second, as the developer and owner of the majority of the end-use product registrations that would be subject to potential cancellation proceedings, were NRDC to prevail in this suit, Hartz has a significantly protectable interest in the

outcome of this case. This Court has ruled that it "[i]s generally enough [to support intervention] that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Berg*, 268 F.3d at 818 (citation omitted). Hartz's registrations are licenses protected by law and in which Hartz has a property interest. *See, e.g.*, Memorandum and Order at 4, *Pesticide Action Network of N. Am. v. EPA*, No. 3:08-cv-01814-MHP ("PANNA") (N.D. Cal. July 8, 2008), Dkt. No. 43 (FIFRA registrations "are essentially government licenses to produce, distribute and sell pesticides," and they "constitute property"); *cf. Sierra Club v. EPA*, 995 F.2d 1478, 1485-86 (9th Cir. 1993) (holders of NPDES permits issued under the Clean Water Act have a protectable interest supporting intervention in cases challenging the permits), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011); 5 U.S.C. § 551(8) ("license" includes "the whole or a part of an agency permit, certificate, approval, registration . . . or other form of permission").

Hartz's property interest in the registrations at issue in this case would be substantially impaired by an adverse decision in this suit. Hartz's ability to continue selling its products is directly related to the Petition for Review. EPA cancellation of the registration of all uses of TCVP, as sought by NRDC, or even any modifications to the registrations of TCVP pet products that might result from a decision of this Court requiring EPA to reconsider its denial of NRDC's

administrative petition would have a concrete and immediate impact on Hartz's property interest and on its ability to lawfully sell and distribute these products. Furthermore, Hartz's extensive participation in EPA's multi-year pet product risk assessment, which led to EPA's decision denying NRDC's petition to cancel all uses of TCVP on pets, is sufficient to support intervention. *See, e.g., Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (approving intervention by entities that were "directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose").

Third, resolution of this Petition without Hartz's participation would likely impair Hartz's ability to protect its interests. NRDC seeks EPA cancellation proceedings on all uses of TCVP on pets, which (if this Court were to overturn EPA's denial of NRDC's petition) could mean a complete prohibition on Hartz's ability to sell and distribute its TCVP pet products. Such an outcome would have a direct and substantial impact on Hartz. Depending on the outcome of EPA's cancellation proceedings, Hartz could be deprived of product sales, and its investment in research and development, regulatory approvals, and marketing for its TCVP-based products would be jeopardized. Hartz's reputation would also be damaged, particularly among pet owners who rely on Hartz's products to protect their pets against parasites. The risk of such negative consequences, should this Court overturn EPA's denial of NRDC's administrative cancellation petition,

entitles Hartz to intervene. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) ("'If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene[.]'") (citing Fed. R. Civ. P. 24 advisory committee's note).

Fourth, the existing parties do not adequately protect Hartz's interests. Intervention is favored where the representation of a proposed intervenor's interests by an existing party to the suit "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (internal quotations omitted). The burden of showing inadequacy is "minimal." *Id.; see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) ("[the] burden in showing inadequate representation is minimal: it is sufficient to show that representation *may* be inadequate[]"), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011).

No party currently in this litigation will adequately represent Hartz's interests. NRDC, which seeks to have EPA cancel Hartz's registrations, plainly cannot represent Hartz's interests. *See* Charles Alan Wright & Arthur R. Miller, 7C *Federal Practice & Procedure* § 1909 (3d ed.) (explaining that parties whose interests "are adverse to the absentee" cannot adequately represent that absentee). Nor is EPA well suited to the task. EPA's "general interest" in seeing its decision

upheld "does not mean [the parties'] particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). Courts consistently have held that government agencies do not represent adequately the interests of private intervenors like Hartz. *See, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003) ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.") (collecting cases); *see also United Farm Workers v. EPA*, No. C 07-3950, 2008 WL 3929140, at *2 (N.D. Cal. Aug. 26, 2008) ("Courts have recognized that . . . private companies like [the pesticide registrant] have a more parochial and financial interest not shared by the EPA.").

Even if EPA and Hartz's interests were more closely aligned, Hartz's participation in this suit would still bring "necessary elements to the proceeding[,]" *Forest Conservation Council*, 66 F.3d at 1499, given Hartz's extensive involvement in EPA's pet product risk assessment. And Hartz's brief in support of EPA would "likely [] serve as a vigorous and helpful supplement to EPA's defense" of the registration[;] *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977). Hartz has significant technical expertise regarding the use of TCVP in pet products and deep familiarity with the data upon which EPA relied in rejecting NRDC's petition. Hartz's experience and expertise would benefit the Court in resolving this case expeditiously. For those reasons, Hartz satisfies the

requirements for intervention as of right.[3]

II. ALTERNATIVELY, HARTZ SHOULD BE GRANTED PERMISSIVE INTERVENTION.

In the alternative, Hartz seeks leave for permissive intervention. Fed. R. Civ. P. 24(b)(1) authorizes permissive intervention when, upon the filing of a timely motion, the movant's claim or defense, and the main action, have a common question of law or fact. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) ("[A]ll that is necessary for permissive intervention is that intervenor's 'claim or defense and the main action have a question of law or fact in common'" as the rule "plainly dispenses with" the other requirements of intervention as of right), *abrogated on other grounds by Wilderness Soc'y v. U.S.*

[3] Hartz is not required to demonstrate Article III standing to intervene on EPA's behalf. *See Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014) (intervenor that is not initiating action or appeal "need not meet Article III standing requirements"); *see also Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017) (requiring standing only where intervenor sought relief different from plaintiff). In any event, Hartz meets the requirements for Article III standing. EPA cancellation of the challenged TCVP use registrations, which NRDC demands in the administrative petition at issue here, would cause Hartz economic loss, a classic form of injury in fact. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) ("[E]conomic injuries have long been recognized as sufficient to lay the basis for standing"). Such injury would be "fairly traceable" to cancellation of those registrations, as it is EPA's registration that authorizes Hartz to sell products with TCVP in the United States. *See* 7 U.S.C. § 136a(a). And a decision favorable to Hartz would prevent the injury from occurring, by preventing the EPA cancellation proceedings involving Hartz's TCVP use registrations "until EPA or the registrant cancels [them] pursuant to Section 6 [of FIFRA], 7 U.S.C. § 136d." *Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1134 (D.C. Cir. 2010).

Forest Serv., 630 F.3d 1173 (9th Cir. 2011). Permissive intervention does not require any showing of inadequacy of representation or a direct interest in the subject matter of the action.

Hartz easily satisfies these requirements. As explained above, Hartz's Motion is timely because it is filed within the statutory timeframe for intervention and will not cause undue delay or prejudice to the parties. Furthermore, Hartz seeks to defend the legality of EPA's decision denying NRDC's petition to cancel all use of TCVP in pet products, which is the focus of this case, thus providing a "common question of law." Because of Hartz's extensive involvement in and familiarity with the administrative proceedings leading up to EPA's denial of NRDC's petition, Hartz's intervention would contribute to the just and equitable adjudication of the legal questions presented. Hartz therefore should be granted permissive intervention, if not granted intervention as of right

CONCLUSION

For the foregoing reasons, Hartz requests that this Court grant this motion to intervene as a respondent in this action.

October 19, 2020

Respectfully submitted,

/s/ Amanda Shafer Berman

Kirsten L. Nathanson
Michael Boucher
Amanda Shafer Berman
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW

Washington, DC 20004
(202) 624-2887
aberman@crowell.com

Counsel for Proposed Intervenor-Respondent The Hartz Mountain Corporation

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,877 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman Font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2020, I filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Amanda Shafer Berman
Amanda Shafer Berman